v. Wilkinson [1899] QB 86 or where the answer is on the face of it "obviously unsustainable". This was echoed in *Sim Kie Chon v. Supt. of Pudu Prison & Ors.* [1985] 2 MLJ 385. See *Nagle v. Fielden* [1966] 2 QB 633 and *Barton Thompson & Co. Ltd. v. Stapling Machines Co.* [1966] Ch. 499/[1966] 2 All ER 22. It is not clear in to-day's case that the action can be dismissed as the plaintiff's claims seems to be on some foundation and the defendants' arguments have not demolished it. On these principles alone, the defendants' application "to strike out **or** stay **or** dismiss" plaintiff's action does not comply with the technical requirements of the Rules.

Conclusion:

I am of the opinion that the validity of the "unproclaimed" or yet-to-be-gazetted provisions (taken as at the time the plaintiff filed his originating summons) is a justiciable issue between the parties to this action. This is an issue of importance. It can be debated by both the State Attorney-General and learned Counsel when the hearing of this action takes place in Court. Considering the above matters and the rules, I am inclined to be lenient on the special aspects of this matter. As I said before, the defendants' application is not precise and can be dismissed. But I shall relent to the learned State Attorney-General's wish. What I propose to do is to give the benefit of the doubt in favour of the defendants and so I shall construe their application as one for "staying these proceedings". On that I now grant defendants' application to stay these proceedings on condition that a case be stated to the Supreme Court as soon as the questions can be framed. Accordingly, I shall adjourn this matter to tomorrow whereupon I shall decide the questions and shall then transmit this case to the Supreme Court in accordance with the Rules of the Supreme Court. There will be no order as to costs. Order accordingly.

UNITED OVERSEAS BANK LIMITED

v.

HEAP HUAT RUBBER CO. SDN. BHD.

HIGH COURT, JOHOR BAHRU
DATO' JAMES FOONG J.
[CIVIL SUIT NO. 22-206 OF 1991]
6 JUNE 1993

PRACTICE & PROCEDURE: Application for amendment to pleading - Preliminary objection against hearing of application - Whether Court functus officio - Whether Court has jurisdiction to hear application before hearing of appeal against decision of SAR.

The defendant made several applications one of which was for amendment to their statement of defence. The plaintiffs objected to the hearing of the applications on the grounds that;

(a) There was an appeal before the Court against the summary decision of the SAR granted in favour of the plaintiffs and as such no purpose would be served for the applications to be heard before the appeal proper;

(b) The Court was *functus officio* once the decision of the SAR was granted. The Court therefore had no jurisdiction to hear the applications until the appeal was to be heard.

Held:

[1] Under O.20 r.5(1) Rules of the High Court 1980 (RHC 1980), the Court may at any stage of the proceedings allow any party to amend his pleadings on such terms as may be just.

[2] O.56 r.1 RHC 1980 provides for appeals against the decision of an SAR to a Judge in Chambers and such an appeal was by way of a rehearing with the Judge treating the matter as if it was up for hearing for the first time. Such being the case the Judge cannot be *functus officio* since he has not even heard the appeal.

[Plaintiffs preliminary objection dismissed].

Case referred to:

Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 CLJ 2 / [1986] 1 MLJ 382 ***(dist)***
Adzmi bin Ali & Anor. v. Mohamed Isa bin Kasad [1987] 1 CLJ 445 / [1987] 2 MLJ 199 ***(dist)***

Tung Lieng (Penang) Trading Co. Sdn. Bhd. v. Liew Cheong Thye [1986] 2 CLJ 434/[1986] 2 MLJ 197 ***(dist)***
Pan Electric Appliances (Pte.) Ltd. v. Electrical & Allied Industries Bhd. [1988] 2 CLJ 473 ***(refd)***
Utama Wardley Bhd. & Anor. v. Lenggang Laut Development Sdn. Bhd. & Ors. ***(refd)***
Invar Realty Pte. Ltd. v. Kenzo Tange Urtec Inc & Anor. [1990] 3 MLJ 388 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 20 r. 5(1),O. 56 r. 1, O. 81

Other sources referred to:
Mallal's Supreme Court Practice, 2nd Edn., p. 680

For the plaintiffs - C.V. Dass (John Matthew & Ong Chee Yong with him); M/s. Ho Thian Cheh & Co.
For the defendants - Paul Tan (Teh Poh Teik, Chok Chin You and Shao Kam San with him); M/s. Yeo, Tan, Hoon & Tee

JUDGMENT

James Foong J:
There are 3 application before me for hearing. These are:

(1) Enclosure 35 which is mainly an application by the defendants for amendment to their statement of defence;
(2) Enclosure 38 which is an application by the defendants for interrogatories from the plaintiffs, and
(3) Enclosure 41 which is an application by the defendants for discovery of documents from the plaintiffs.

Before hearing of the 3 applications proper, Mr. C.V. Dass, Counsel for the plaintiffs, made preliminary objections to the hearing of these applications. His objections were as follows:

(a) There is an appeal before this Court against the summary decision of the Senior Assistant Registrar granted in favour of the plaintiffs; as such no purpose would be served for these 3 applications to be heard before the appeal proper; since there is in existence a proper judgment given by the Senior Assistant Registrar. If the defendants succeed in their appeal before this Court, these applications would then be meaningful and can be proceeded upon;

(b) that this Court is *functus officio* once the decision of the Senior Assistant Registrar is granted. Such being the case, this Court has no jurisdiction to hear these applications until the appeal is being heard.

Mr. Tan, Counsel for the defendants, opposed these preliminary objections. In support of his contention, Mr. Tan submitted that this Court has always the power to hear any applications, particularly that of an amendment to the pleading which, in this case is the statement of defence. Further, he contended that the cases cited by Mr. Dass do not apply to the circumstances of this case.

I had the full opportunity to study all the authorities submitted by both learned Counsel. Based on the submissions by both parties and the authorities I find that the plaintiffs' preliminary objections must fail.

Under O. 20 r. 5(1) of the Rules of the High Court Rules (RHC), the Court may at any stage of the proceedings allow any party to amend his pleadings, of course on such terms as may be just. I do not agree that this Court is *functus officio* by the judgment of the Senior Assistant Registrar. It is *functus officio* as far as the Senior Assistant Registrar is concerned but, not the towards the Judge who has yet to hear the appeal itself.

Order 56 r. 1 provides for appeal against the decision of a Senior Assistant Registrar to the Judge in Chambers. It is a trite law that such an appeal is by way of a rehearing and the Judge treats such matter as if it is up for hearing for the first time. (See **Mallal's Supreme Court Practice** 2nd Edn. p. 680). Such being the case, the Judge cannot be *functus officio* since he has not even heard the appeal and if such hearing is similar to that of a hearing for the first time, more so he cannot be *functus officio.*

Mr. Dass cited the case of *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382 to support his contention. In this case, the High Court gave decision under O. 81 RHC. The appellant appealed to the Supreme Court for amendment to the statement of defence. The application was refused for, the appellant could not even have applied for amendment at the High Court since the High Court had given its decision. This case can be distinguished from our present situation by the fact that the High Court there had become *functus officio* when it gave its decision under an O. 81 application and, an appeal had been lodged to the Supreme Court. The matter before the High Court there had come to an end and the matter

there was passed onto the jurisdiction of the Supreme Court. In our case, the decision is only that of a Senior Assistant Registrar and the Judge is entitled to rehear the case as if for the first time.

The second case quoted by Mr. Dass is that of *Adzmi bin Ali & Anor. v. Mohamed Isa bin Kasad* [1987] 2 MLJ 199. Again this case can be distinguished by the same feature as that in *Alloy Automative Sdn. Bhd.* where the High Court Judge had given his decision. The matter had ended and the Judge had become *functus officio.*

As for the third case submitted by Mr. Dass which is *Tung Lieng (Penang) Trading Co. Sdn. Bhd. v. Liew Cheong Thye* [1986] 2 MLJ 197, I find that it is distinguishable by the fact that the learned Judge had given his certificate of no further argument and as such was *funtus officio.*

All these 3 cases have a similar characteristic and that is, the final determination of the subject matter by the High Court Judge. Unlike this case before me, the procedure for final determination has not been completed as yet. Though the Senior Assistant Registrar had given her decision but, O. 56 r. 1 provides for appeal and, this comes in the form of a rehearing. As I have stated before, *functus officio* may apply to the Senior Assistant Registrar but not to the Judge on appeal under these circumstances.

Mr. Dass attempted to distinguish the case of *Pan Electric Appliances (Pte.) Ltd. v. Electrical & Allied Industries Bhd.* [1988] 2 CLJ 473 and *Utama Wardley Bhd. & Anor. v. Lenggang Laut Development Sdn. Bhd. & Ors.* where in both instances, amendments were allowed on the pleadings subsequent to decisions of Senior Assistant Registrars and appeals were pending before the Judge. He submitted to this Court a Singapore authority of *Invar Realty Pte. Ltd. v. Kenzo Tange Urtec Inc & Anor.* [1990] 3 MLJ 388 where, Justice Yong Pung How (as he then was) followed a narrow interpretation of the Rules of the High Court and disallowed an amendment at the subsequent stage of proceedings. A careful study of the facts of this Singapore case revealed that, the application for amendment by the plaintiffs was with the objective of annulling their admission to the second defendant's counter-claim where an O. 14 judgment had already been obtained against the plaintiffs. Such application was dismissed because it goes to the very root of the judgment given which was founded on an admission. The situation in this case cannot be applied to our present circumstances.

Be that as it may, at this stage, this Court is only concerned with the preliminary objection of the plaintiffs and will not be pressed into considering the merits of the application proper.

Based on the grounds stated aforesaid, this Court dismissed the plaintiffs' preliminary objection and shall proceed to hear the said applications proper.